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No. 06-313
(Capital Case)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Weaver contends that the petition should be dismissed as improvidently granted because petitioner's merits-brief arguments are "radically at odds" and "irreconcilable" with the question presented and because they do not challenge what, in Weaver's view, is an independent Eighth Amendment ground for the court of appeals' judgment. Resp. Br. 17, 20. He also faults the Missouri Supreme Court for not conducting a lengthier analysis of his due process claim and repeatedly asserts that the prosecutor's arguments were nearly identical to arguments that the court of appeals had held improper in two other capital trials. None of these arguments has merit.

A. Petitioner's arguments for reversal are within the question presented and merit this Court's consideration.

The question presented in this case asks whether the court of appeals "exceed[ed] its authority under 28 U.S.C. §2254(d)(1) by overturning a capital sentence on the ground that the penalty phase closing argument was 'unfairly inflammatory.'" Pet. for Cert. i.

Weaver does not dispute that petitioner's arguments are directed at showing that this question should be answered, "Yes." He contends, however, that because the question presented is prefaced by the statements that "this court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be," petitioner cannot argue that *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Romano v. Oklahoma*, 512 U.S. 1 (1994), constitute clearly established federal law" under §2254(d)(1) – even though Weaver himself agrees that those three cases "govern[]" his habeas claim. Resp. Br. 26.

First, the Court has never read a question presented as narrowly as Weaver urges it to do so here. In all but one of the Rule 14.1(a) cases that Weaver cites, the petitioners asked the Court to rule on issues that "quite clearly [were] not included in the question presented by their petition for certiorari." *American National Bank and Trust Company of Chicago v. Haroco, Inc.*, 473 U.S. 606, 609 (1985).

In *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175 (1938),[1] *Irvine v. California*,

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[1] In *General Talking Pictures*, the Court granted certiorari on two questions concerning a purchaser's use of a

347 U.S. 128 (1954),[2] and *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corporation*, 510 U.S. 27 (1993),[3] for example, the Court refused to consider questions added to merits briefs that were not included in, and were analytically separate from, the questions listed in the petitions. In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450

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device manufactured under a patent and one question concerning unclaimed inventions. 304 U.S., at 177. At the merits stage, the petitioner sought to add questions concerning estoppel and invalidity due to anticipation by, or want of invention over, the prior patented art. *Id.*

[2] In *Irvine*, the petition tendered four "constitutional questions growing out of methods employed to convict petitioner on charges of horserace bookmaking and related offenses against the antigambling laws of California." 347 U.S., at 129. At the merits stage, petitioner tried to add two questions "concerning the application of an immunity statute of California and another attaching certain instructions given to the jury by the trial court." *Id.*

[3] In *Izumi*, the petition "presented a single question" for review: "Should the United States Courts of Appeals routinely vacate district court final judgments at the parties' request when cases are settled while on appeal." 510 U.S., at 30. In its brief on the merits, petitioner tried to add a question concerning the denial of an intervention motion. *Id.*

(1995),[4] and *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992),[5] the Court declined to address petitioners' arguments that federal statutes not mentioned in the questions presented or in the litigation below provided alternate grounds for reversing the lower courts' judgments. In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Court likewise declined to address petitioner's argument that the jury instructions on seaman status under the Jones Act were reviewable only for plain error under Rule 51 of the Federal Rules of Civil Procedure when the question presented asked unreservedly, "What employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman under the Jones Act, 46 U.S.C. § 688?" 515 U.S., at 353 n.*. And in both *Nynex Corporation v. Discon, Incorporated*, 525 U.S. 128 (1998),[6] and *American*

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[4] In *Oklahoma Tax Commission*, petitioner argued for the first time in its merits brief that the Hayden-Cartwright Act, 4 U.S.C. §104, expressly authorized a state tax on Indian motor fuels sales, but the question presented asked only whether "principles of federal pre-emption or Indian sovereignty" precluded the tax. 515 U.S., at 456-457.

[5] In *Taylor*, the question presented was: "Whether, under Section 522(*l*) of the Bankruptcy Code, a bankruptcy court must exempt property from the bankruptcy estate, even though the debtor had no colorable basis for claiming the exemption, because no one objected to the claimed exemption within the period set forth in Bankruptcy Rule 4003(b)." Pet. for Cert. i, *available at* 1991 WL 11009241. At the merits stage, petitioner argued for the first time that the exemption was valid under "a different provision of the bankruptcy code, 11 U.S.C. §105(a)." *Taylor*, 503 U.S., at 645.

[6] In *Nynex*, the petitioner argued in its merits brief that respondent's antitrust complaint did not allege that their

National Bank and Trust,[7] *supra*, the Court did not address whether the underlying complaints alleged violations of the Sherman Act, 15 U.S.C. §1, and the Racketeer Influenced Corrupt Organization Act (RICO), 18 U.S.C. 1962(c), respectively, when the questions presented did not encompass the complained of pleading requirements. Finally, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court refused to address petitioner's alternate argument that a mobile home ordinance effected a regulatory taking, when the question presented asked only whether the lower court had erred by not agreeing with two federal appellate decisions that had held that similar mobile home ordinances effected physical takings, not regulatory takings. 503 U.S., at 536-537.

The remaining case that Weaver cites – *Norfolk Southern Railway Company v. Sorrell*, 127 S. Ct. 799 (2007) – also does not support his Rule 14.1(a) argument. There the Court granted certiorari to consider whether a state court erred in determining that "the causation standard for employee contributory negligence under [the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60,] differs from the causation standard for railroad negligence." 127 S. Ct., at 803 (internal quotations and emphasis omitted). In its merits brief, the petitioner sought to "expand the question presented to

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purchasing decisions harmed the competitive process, but the questions on which the Court granted certiorari were limited to application of the *per se* rule. *Nynex*, 525 U.S., at 140; *Nynex* Pet. for Cert i, *available at* 1998 WL 283056.

[7] In *American National Bank*, the petitioners argued that respondents' RICO complaint did not adequately allege a violation of 18 U.S.C. §1962 because respondents did not show "that the enterprise was 'conducted' through a pattern of racketeering activity." 473 U.S., at 608. But the question presented was limited to causation for damages. *Id.*, at 608 n.*.

encompass *what* the standard of causation under FELA should be," arguing "that the [more rigorous] proximate cause standard reflected in the [state court] instruction for employee contributory negligence should apply to the railroad's negligence as well." *Id.*, at 803-804 (emphasis in original). Although the Court recognized that it "could consider the question of what standard applies as anterior to the question of whether the standards may differ," it declined to do so, observing that petitioner's current position was "contrary to the position it litigated below" (where it had argued that the less rigorous railroad liability standard should apply to employee contributory negligence), that petitioner had not objected to the railroad liability instruction, and that it would thus be "unfair" to the respondent to allow petitioner to "switch gears" at this late stage. *Id.*, at 804-805.

This case stands in sharp contrast to the Rule 14.1(a) cases that Weaver cites; petitioner is not asking the Court to rule on an issue outside the plain terms of the question presented. Here the issue of what constitutes the "clearly established federal law" under §2254(d)(1) for analyzing Weaver's habeas claim is subsidiary to the broad question listed in the petition: whether the lower court "exceed[ed] its authority under 28 U.S.C. §2254(d)(1) by overturning a capital sentence on the ground that the penalty phase closing argument was 'unfairly inflammatory.'" Pet. for Cert. i.

The prefatory statements in the question presented do not change that. For one can rationally take the position that *Donnelly, Darden*, and *Romano* govern, or that they do not, yet still agree that "this court has never held a prosecutor's penalty phase closing argument to violate due process" nor "articulated, in response to a penalty phase claim what the standard of error and prejudice would be" for an allegedly improper penalty phase closing argument.

Second, even if it were possible to read the prefatory statements to limit the scope of the question presented, the Court should nonetheless reject Weaver's argument. The

Court's "power to decide is not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978), citing *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 320 n.6 (1971). And in this case, it makes no sense to preclude petitioner from addressing the applicability of *Donnelly*, *Darden*, and *Romano*.

Weaver agrees that *Donnelly*, *Darden*, and *Romano* govern his claim, and he himself would have made that argument in his opposing brief had petitioner not done so first. *See* Resp. Br. 26. And so even if petitioner had limited his opening-brief arguments as Weaver suggests, petitioner unquestionably would have responded in his reply brief with essentially the same argument that is in his opening merits brief – that even if those three cases govern, the Missouri Supreme Court's decision is entitled to §2254(d)(1) deference.

Dismissing the case because petitioner made that argument in his opening brief rather than in his reply would be unfair to petitioner and result in a windfall to Weaver. Not dismissing the petition, on the other hand, simply leaves the issues inherent in the question presented and inevitably part of the case to this Court's full and fair consideration.

Finally, the fact that petitioner and Weaver agree that *Donnelly*, *Darden*, and *Romano* govern Weaver's substantive claim does not render the case unworthy of this Court's review. Since *Williams v. Taylor*, 529 U.S. 362 (2000), the broad standards for determining whether a state court's decision is "contrary to" or an "unreasonable application" of clearly established federal law under §2254(d)(1) have largely been settled. The problem with the underlying court of appeals decision is that it badly misapplied this Court's §2254(d)(1) precedents.[8] *See* Pet. Br. 28-30. That misapplication properly continues to deserve this Court's attention. *See* This Court's

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[8] Notably, even Weaver's opposing brief makes no attempt to defend the court of appeals' analysis.

Rule 10(a) (certiorari review warranted were a federal court of appeals has "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory powers").

B. The court of appeals' judgment does not rest on unchallenged, independent Eighth Amendment grounds.

Weaver is also wrong to suggest that there is an unchallenged, independent Eighth Amendment ground for the lower courts' rulings. The district court granted Weaver habeas relief solely on the basis that "the prosecutor's improper penalty phase closing argument violated [Weaver's] due process rights." Pet. App. A-185. *See also id.*, at A-61, A-71-A-72 (same). In affirming the district court's judgment, the court of appeals likewise treated the issue as one of due process. *See* Pet. App. A-12 (stating due process standard before discussing the complained of prosecutorial remarks).

The court of appeals' citation to Eighth Amendment cases does not indicate an independent Eighth Amendment holding. The court cited Eighth Amendment decisions to inform its determination that Weaver's Fourteenth Amendment rights were violated.[9] *See* Pet. App. A-13-A-14, citing *Zant v. Stephens*, 462 U.S. 862 (1983); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Jones v. United States*, 527 U.S. 373 (1999);

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[9] The court of appeals' treatment of Weaver's claim is consistent with Weaver's federal appellate briefs. For example, in the statement of issues section of his appellate brief, Weaver did not list any independent Eighth Amendment ground for his claim. Rather, he argued that the district court had "correctly" granted habeas relief when it found a due process violation, and cited one Eighth Amendment case in support of that point. Weaver App. Br. xii.

Buchanan v. Angelone, 522 U.S. 269 (1998); *Romano v. Oklahoma*, 512 U.S. 1 (1994); *Harmelin v. Michigan*, 501 U.S. 957 (1991). Nor would an independent Eighth Amendment holding make sense on the facts of this case. This Court has never held that prosecutorial remarks similar to those at issue here violate the Eighth Amendment.

Last, even if the court of appeals' decision could be read otherwise (a possibility petitioner denies), petitioner has challenged the court of appeals' reliance on Eighth Amendment precedent. *See* Pet. Br. 28-29 (faulting court of appeals for relying on "Eighth Amendment precedent not directly on point").

C. The Missouri Supreme Court cannot be faulted for not having anticipated Weaver's current arguments.

On the merits, Weaver argues that the Missouri Supreme Court's decision is not entitled to deference under §2254(d)(1)'s unreasonable application prong because the state court's treatment of his due process claim "conspicuously failed to follow" the *Donnelly/Darden/Romano* guideposts or to identify the same five categories of improper argument that the court of appeals did in its analysis. Resp. Br. 44-45. He is wrong.

Section 2254(d)(1) does "not require citation of" or even "awareness" if this Court's cases. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). And it does not it put federal courts in a "tutelary relation to the state courts" in terms of opinion writing. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997) (Posner, J.) (noting that the AEDPA amendments were designed to avoid such a result); *accord Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc). Rather, it requires federal courts to assess whether a state court's "adjudication of [a habeas] claim" involved an objectively unreasonable application of this Court's holdings. §2254(d)(1); *Williams*,

529 U.S., at 409-410.

These principles apply with particular force here. Weaver presented his habeas claim to the Missouri Supreme Court in truncated form, and he now attacks that court for having given his arguments essentially the same depth of treatment that he gave them in the state appeal. The relevant portion of Weaver's state appellate brief is reproduced on pages 44-61 of the Joint Appendix, and the relevant pages of the Missouri Supreme Court's decision are reproduced on pages A-232-A-237 of the Appendix to the Petition for Certiorari. A side-by-side comparison of these two passages shows that the Missouri Supreme Court's analysis closely tracks, in terms of length, substance, and structure, the arguments that Weaver made in his brief.

Notably, Weaver's state appellate brief nowhere mentions *Donnelly*, *Darden*, or *Romano* or any of the guideposts that Weaver now gleans from those cases. And it does not categorize the improper arguments into the five categories identified by the court of appeals.[10] Further, while Weaver now criticizes the Missouri Supreme Court for not addressing at length his argument that the prosecutor improperly urged imposition of the death penalty to further a societal "war on drugs," his state appellate brief gave short shrift to the argument, limiting it to a paragraph, and not

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[10] For example, while the court of appeals concluded that the prosecutor's reference to the movie "Patton" was a category unto itself (category 1), Weaver's state appellate brief quoted the prosecutor's Patton reference only in the context of arguing that the prosecutor had improperly emphasized his position as the elected prosecutor. J.A. 50. Weaver's state appellate brief also lumped what the court of appeals called "statements by the prosecutor about his personal belief in the death penalty" (category 2) under the improper-emphasis-of-elected-position heading. J.A. 49.

quoting any of the allegedly improper remarks, as Weaver had done for the other claims that the Missouri Supreme Court discussed in detail. *See* J.A. 60-61 (providing only a string of citations to transcript pages for allegedly improper remarks).

To now allow Weaver to attack the Missouri Supreme Court's decision simply because that court followed his state appellate brief's lead in analyzing and assigning significance to the underlying aspects of his due process claim would serve only to frustrate the federalism principles that AEDPA was designed to further.

D. The record does not support Weaver's repeated characterization of the prosecutor's arguments as "defiantly delivered" arguments "nearly identical" to two other arguments held improper by the court of appeals.

Last, it bears mention that the record does not support Weaver's repeated assertions that the prosecutor's arguments in his case were "pre-planned," "defiantly delivered" arguments that were "nearly identical" to the arguments held improper in *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989), and *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999). Resp. Br. 48. *See also id.*, at 1, 19, 35-36 (similar).

At Weaver's state post-conviction relief hearing, the prosecutor testified that he was aware of the district court's *Newlon* ruling,[11] but not the specific grounds of the decision other than that it was partially based on the remarks made in

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[11] *Newlon v. Armontrout*, 693 F.Supp. 799 (W.D. Mo. 1988), *aff'd* 885 F.2d 1328 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990).

closing argument.[12] The prosecutor was not aware of the court of appeals' decision in *Newlon* because it was not issued until a year after Weaver's July 1988 trial. *Shurn* was not decided until 1999 – more than a decade later.

In any event, both of those pre-AEDPA cases reversed capital sentences for prosecutorial arguments that were not present in Weaver's case. *See Shurn*, 177 F.3d, at 664-665; *Newlon*, 885 F.2d, at 1336 & appendix (arguments (i) asking the jurors to take an "eye for an eye," (ii) referencing well known serial killers, (iii) asking the jurors to think about the defendant or someone else killing or harming "your child," and (iv) repeatedly emphasizing the prosecutor's elected position, without objection by defense counsel or any curative instruction by the trial court).

Even if the arguments were similar enough to raise an inference that the prosecutor's arguments in Weaver's case were not extemporaneous, the court of appeals decision should

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[12] At the post-conviction relief hearing, the prosecutor testified:

> "Q: And you -- And you were aware of the reasons [the *Newlon* sentence] was reversed [by the district court]?
>
> "A: I assume I was, yes.
>
> "Q: Okay.
>
> "A. Certainly generally, if not specifically.
>
> "Q: Okay. If you want to read that, do you recall why it was reversed?
>
> "A: My recollection is I don't recall all of the specific reasons. Certainly I recall that it -- there were some -- based somewhat on some of my remarks in closing argument.
>
> "Q: Okay.
>
> "A: But there may have been some other reasons as well. I don't recall." PCR Tr. 155.

nonetheless be overturned. The key inquiry under the *Donnelly/Darden/Romano* line of cases is not what the prosecutor subjectively intended to convey to the jurors, but what the jurors understood the prosecutor to be saying and whether it affected their decision to impose the death penalty. *See, e.g., Romano*, 512 U.S., at 12-14 (assessing whether jury would have given effect to evidence and whether it admission would have rendered "the jury's imposition" of the death penalty a denial of due process). For the reasons stated in petitioner's opening brief, the fairest contextual readings of the arguments about which Weaver complains are far less damaging than the readings that he or the court of appeals gives. And it is reasonable to conclude that those arguments did not deprive Weaver of due process.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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